

<p><b>DISTRICT COURT, WATER DIVISION NO. 5, COLORADO</b></p> <p>Garfield County Courthouse 109 8<sup>th</sup> Street, Suite 104 Glenwood Springs, CO 81601 970/945-5075</p>	<p>DATE FILED: April 19, 2019 5:30 PM FILING ID: 7778CDCAD9ECC CASE NUMBER: 2016CW3129 <b>Settlement Draft: March 20, 2019</b></p>
COURT USE ONLY	
<p>CONCERNING THE APPLICATION FOR FINDING OF REASONABLE DILIGENCE OF THE CITY OF ASPEN</p> <p>in PITKIN COUNTY, COLORADO</p>	<p>Case Number: 2016CW3129 (CA5884, W-791, W-791-77, 81CW063, 85CW045, 89CW030, 95CW187, 02CW19, 09CW145)</p> <p>Water Division No. 5</p>
<p><b>FINDINGS OF FACT, CONCLUSIONS OF LAW, JUDGMENT AND DECREE OF THE WATER COURT (Castle Creek Reservoir)</b></p>	

This matter comes before the Water Court upon the application of the City of Aspen, Colorado (“Applicant” or “Aspen”) for a finding of reasonable diligence. The Court, having reviewed the pleadings of the parties, the comments of the Division Engineer and responses thereto and having become fully advised with respect to the subject matter of the Application hereby makes the following Findings of Fact, Conclusions of Law, Judgment and Decree of the Water Court (“Decree”).

### **FINDINGS OF FACT**

1. Applicant. The applicant is the City of Aspen, Colorado, c/o David Hornbacher, Utilities Director, 130 South Galena Street, Aspen, CO 81611, telephone, (970) 920-5110. Copies of all pleadings in this matter are to be delivered to Cynthia F. Covell and Andrea Benson, Alperstein & Covell P.C., 1600 Broadway, Suite 1070, Denver, CO 80202.

2. Application. The Application in this matter was filed by Aspen on October 31, 2016, and referred to the Water Referee for Water Division No. 5, State of Colorado by the Water Judge of said Court in accordance with Article 92, Title 37, of the Colorado Revised Statutes known as the Water Right Determination and Administration Act of 1969. The matter was re-referred to the Water Court on August 27, 2018.

3. Notice and Jurisdiction. Timely and adequate notice of the pendency of these proceedings *in rem* was given in the manner provided by law. The Application was published in the Water Resume for Water Division 5 for October, 2016, and in the *Grand Junction Daily*

*Sentinel* on November 20, 2016, the *Aspen Times Weekly* on November 24, 2016 and the *Rifle Citizen Telegram* on November 24, 2016. The Court has jurisdiction over the subject matter of this proceeding and over all persons and property affected hereby, irrespective of whether those persons or property owners have appeared. None of the lands or water rights involved in this case is within the boundaries of any designated groundwater basin.

4. Statements of Opposition and Stipulations. Timely statements of opposition were filed by Double R Creek Limited, Asp Properties LLC, Wilderness Workshop, Western Resource Advocates, American Rivers, Colorado Trout Unlimited, Pitkin County, and the United States of America. The time for filing Statements of Opposition has now expired. Aspen has entered into the following stipulations with all Opposers, and the Court has approved such stipulations by Order of the Court:

- a. Stipulation and Agreement Between Applicant City of Aspen and Opposer American Rivers (Castle Creek Reservoir), dated August 28, 2018;
- b. Stipulation and Agreement Between Applicant City of Aspen and Opposer Asp Properties, LLC, dated May 18, 2018;
- c. Stipulation and Agreement Between Applicant City of Aspen and Opposer Board of County Commissioners of Pitkin County, dated May 24, 2018;
- d. Stipulation and Agreement Between Applicant City of Aspen and Opposer Colorado Trout Unlimited (Castle Creek Reservoir), dated August 28, 2018;
- e. Stipulation and Agreement Between Applicant City of Aspen and Opposer Double R Creek Limited, dated August 28, 2018;
- f. Stipulation and Agreement Between Applicant City of Aspen and Opposer Western Resource Advocates, dated August 28, 2018;
- g. Stipulation and Agreement Between Applicant City of Aspen and Opposer Wilderness Workshop, dated August 28, 2018; and
- h. Stipulation and Agreement Between Applicant City of Aspen and Opposer United States of America, dated August 28, 2018.

The terms of the stipulations between Applicant and American Rivers, Board of County Commissioners of Pitkin County, Colorado Trout Unlimited, Double R Creek Limited and the United States of America shall be deemed additional terms within this decree.

5. Name of structure and Name of Water Right: The name of the structure is Castle Creek Reservoir. The conditional water right that is the subject of this decree is referred to hereinafter as "Castle Creek Reservoir water right."

6. Original Decree for Conditional Water Right: The Castle Creek Reservoir water right was originally decreed on November 5, 1971 in Case No. CA 5884, District Court, Garfield County, Colorado.

7. Subsequent Decrees Awarding Diligence. Diligence was awarded in Case No. W-791 (March 15, 1973); W-791-77 (November 7, 1977); 81CW063 (October 29, 1982); 85CW045 (July 17, 1985); 89CW030 (August 29, 1989), 95CW187 (January 4, 1996), 02CW19 (September 3, 2003), and 09CW145 (October 11, 2010).

8. Location of Conditional Water Right: The decreed location of the Castle Creek Reservoir water right is as follows:

The original decreed location of Castle Creek Reservoir is located in Sections 18 and 19, Township 11 South, Range 84 West of the 6<sup>th</sup> P.M., Pitkin County, Colorado. The initial point of survey of the high water line of the reservoir on the east side of the dam is located such that the angle from the axis of the dam measured clockwise is 66°25' to Highland Peak and 340°51' to Hayden Peak. (Ties to mountain peaks were used since the reservoir lies within an area not surveyed by local, state or federal agencies.)

By stipulations and agreements with certain landowners, Aspen has agreed to the following **revised legal description** of the location of the Castle Creek Reservoir:

The Castle Creek Reservoir is located in Sections 18 and 19, Township 11 South, Range 84 West of the 6<sup>th</sup> P.M., Pitkin County, Colorado, but excluding certain parcels of land described as (1) Lot 1, Part of Subdivision H.E.S. 305, according to the Plat thereof recorded January 22, 1980 in Plat Book 8 at Page 77, County of Pitkin, State of Colorado; and (2) that portion of Tract 39, Section 19, Township 11, Range 84 West, located East of Castle Creek Road. The initial point of survey of the high water line of the reservoir on the east side of the dam is located such that the angle from the axis of the dam measured clockwise is 66°25' to Highland Peak and 340°51' to Hayden Peak. (Ties to mountain peaks were used since the reservoir lies within an area not surveyed by local, state or federal agencies.)

A map showing the location of the Castle Creek Reservoir as originally decreed is attached as Exhibit A.

9. Source. The decreed source of supply for the Castle Creek Reservoir water right is Castle Creek, tributary to the Roaring Fork River.

10. Appropriation Date and Amount. The appropriation date is July 19, 1965. The amount appropriated for the Castle Creek Reservoir is 9,062 acre-feet.

11. Decreed Uses. As stated in the decree in CA5884, water stored in Castle Creek Reservoir is decreed for industrial, irrigation, domestic, municipal, and other beneficial uses, both consumptive and non-consumptive, and for the use and benefit of the parties lawfully entitled thereto, sufficient water to fill said reservoir to its capacity of 9,062 acre-feet and to keep said reservoir reasonably well filled.

12. Integrated Water Supply System. The Castle Creek Reservoir is part of Aspen's integrated water supply system which currently includes surface water rights decreed for diversion from Maroon Creek, Castle Creek, Hunter Creek and the Roaring Fork River, and decreed wells, as well as water mains, lines and distribution systems for both raw and treated water, pump systems and related infrastructure, a hydroelectric plant and related infrastructure, all of which allow Aspen to provide water for municipal uses, including hydropower, within the city, and extraterritorially by agreement. The Castle Creek Reservoir water right is part of Aspen's integrated municipal water supply system. §37-92-301(4)(b), C.R.S.

13. Finding of Reasonable Diligence. The Application requests a finding that the Applicant has exercised reasonable diligence in the development of the Castle Creek Reservoir water right. The Court has reviewed the Application and has considered the Report of the Division Engineer Summary of Consultation and responses thereto and finds that the work and expenditures described in the Application and the responses to the Summary of Consultation constitute reasonable diligence in the development of 8,500 acre-feet of the Castle Creek Reservoir water right, that the Application should be granted and the conditional decree for the Castle Creek Reservoir water right in the amount of 8,500 acre-feet shall be continued in full force and effect, and the remaining 562 acre-feet conditionally decreed to the Castle Creek Reservoir water right shall be relinquished and cancelled.

14. No Precedent. It is specifically understood and agreed by the parties in this case, and found and concluded by the Court, that the specific factual and legal findings of this contested matter were not actually litigated and that the acquiescence of the parties to this stipulated decree shall not be construed as precedent for any other situation, except as expressly stated in the stipulations between Aspen and Opposers, and shall not give rise to any argument, claim, defense or theory of acquiescence, waiver, bar, merger, stare decisis, res judicata, estoppel, or laches, nor to any administrative practice or precedent, by or against any of the parties in any other matter, case or dispute, except as expressly stated in the stipulations between Aspen and the Opposers.

## CONCLUSIONS OF LAW

15. The foregoing Findings of Fact are incorporated herein to the extent they constitute conclusions of law.

16. Timely and adequate notice of the Application was given in the manner provided by law, and the Application filed herein is complete, covering all applicable matters required under C.R.S. Section 37-92-302.

17. All notice required by law has been given, and no further notice need be given. C.R.S. Sections 37-92-101, et. seq.

18. The Court has jurisdiction over the subject matter of this proceeding and over all persons and property affected by this Application, regardless of whether such persons or property owners have appeared. C.R.S. Sections 37-92-301(2), 303(1) and 304.

19. The Court concludes that Aspen has established that it has a non-speculative need for 8,500 acre-feet of the Castle Creek Reservoir water right, that water can and will be stored under the Castle Creek Reservoir water right and will be beneficially used, and that the appropriation can and will be completed with diligence and within a reasonable time.

20. Aspen has complied with all requirements and met all standards and burdens of proof including but not limited to those set forth in §§ 37-92-302(1), 37-92-103(3), and 37-92-305(9) to adjudicate its claim for finding of reasonable diligence and is therefore entitled to a continuation of the conditional decree confirming and approving the Castle Creek Reservoir water right as described in the Findings of Fact. Aspen has satisfied all other statutory and legal requirements to support a finding of reasonable diligence with regard to the Castle Creek Reservoir water right.

21. The Application is in accordance with Colorado law and should be granted.

#### **JUDGMENT AND DECREE**

22. The Findings of Fact and Conclusions of Law, as set forth above, are incorporated herein by reference and are hereby modified as necessary to constitute part of the Judgment and Decree.

23. The Application for finding of reasonable diligence is granted in the amount of 8,500 acre-feet conditional to the Castle Creek Reservoir for storage for industrial, irrigation, domestic, municipal, and other beneficial uses, both consumptive and non-consumptive, and for the use and benefit of the parties lawfully entitled thereto, sufficient water to fill said reservoir to its capacity of 8,500 acre-feet and to keep said reservoir reasonably well filled, with an appropriation date of July 19, 1965, provided that the total annual volume of water diverted to storage pursuant to the Castle Creek Reservoir water right that is the subject of this case, and the Maroon Creek Reservoir water right (also originally decreed in CA5884), collectively, shall not exceed 8,500 acre-feet. The remaining 562 acre-feet conditionally decreed to the Castle Creek Reservoir water right is hereby relinquished and cancelled.

24. It is hereby ordered that the conditional decree for the Castle Creek Reservoir water right in the amount of 8,500 acre-feet herein described is continued in full force and effect until \_\_\_\_\_, 20\_\_\_\_, and if Aspen desires to maintain said water right, an application for finding of reasonable diligence shall be filed on or before that date or a showing shall be

made on or before that date that the conditional water right has become absolute by reason of completion of the appropriation.

25. Pursuant to Rule 9 of the Uniform Local Rules for All State Water Court Divisions, upon the sale or transfer of any conditional rights decreed herein, the transferee shall file with the water court a notice of transfer which shall state or provide the following information:

- a. The title and case number of the case in which the conditional decree was issued;
- b. The description of the conditional water right transferred;
- c. The name of the transferor;
- d. The name and mailing address of the transferee; and
- e. A copy of the recorded deed.

The owner of any conditional water right shall notify the clerk of the water court of any change in mailing address. The clerk shall also place any notice of transfer or change of address in the case file for CA5884 and in the case file for this case.

26. It is further ordered that a copy of this Decree shall be filed with the Division Engineer, Water Division No. 5, and with the State Engineer.

Dated \_\_\_\_\_

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James B. Boyd, Water Judge  
Water Division No. 5  
State of Colorado